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I. INTRODUCTION

On July 6, 1989, while on vacation at the Palmas Del Mar Resort in Puerto Rico, a twelve-year old girl named Natalie Calhoun rented a "Wavejammer," a type of jet ski made by Yamaha Motor Company.[1] Tragically, Natalie slammed the jet ski into an anchored vessel and was killed.

Natalie was from Pennsylvania; the manufacturer of the jet ski was from Japan; the distributor of the jet ski was a California corporation. Had Natalie been killed on an inland lake, state law would have governed her case. Like any other case having multi-state aspects, the lawyers representing Natalie's estate would have to resolve the question of where to sue based in part on which law will be applied. Because her accident occurred on navigable waters and probably had a "substantial connection to traditional maritime activity," the choice of law problem had an additional wrinkle: might federal admiralty law preempt any state law regardless of where suit was brought?

Natalie's parents, who lived in Pennsylvania, sued Yamaha individually and in their capacity as administrators of their daughter's estate in the Eastern District of Pennsylvania. They sued under Pennsylvania's wrongful death statute and its survival statute, seeking recovery for negligence, strict liability, and breach of the implied warranties of merchantability and fitness. Unlike most states, Pennsylvania's survival statute permits recovery for lost future earnings.[2] The parents sought recovery for that element of damage as well as for loss of services and support, loss of society, funeral expenses and punitive damages.

The trial court ruled that federal maritime law requires a uniform national standard in cases like this one and that state law may only be used by the courts in determining what the uniform federal law should be.[3] It determined that lost future earnings and punitive damages could not be awarded, but that loss of society and loss of services and support could be awarded. The District Court certified to the Court of Appeals the questions of whether a federal maritime

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1. Calhoun v. Yamaha Motor Corp., U.S.A., Civ. A. 90-4295, 1993 WL 216238 (E.P. Pa. June 22, 1993). The jet ski was distributed by Yamaha Motor Corporation, U.S.A. The manufacturer and distributor are referred to throughout the opinions and this article collectively as "Yamaha."

2. 42 Pa. Cons. Stat. Ann. § 8302 (1982).

3. *Calhoun*, 1993 WL 216238 at *7-8.

cause of action may provide recovery for loss of society, lost future earnings, and punitive damages.

The Third Circuit chose not to respond to the questions of law presented by the District Court.[4] Instead it addressed the underlying question presented by the District Court's order: does federal maritime law preempt the state from providing remedies for wrongful death and survival arising out of a death of a non-seaman on territorial waters. The Court of Appeals concluded that state law could be applied in this area. It left to the District Court the question of which state law should apply, that of Pennsylvania or that of Puerto Rico.

The Supreme Court granted certiorari and unanimously affirmed the Third Circuit's decision.[5] It held that the suit for wrongful death was within the admiralty jurisdiction of the federal courts and that the federal wrongful death action created in *Moragne v. States Marine Lines*[6] did not displace state remedies. The opinion leaves open several important issues and raises the possibility that state law will have a much greater role to play in admiralty cases.

The *Yamaha* litigation raised jurisdictional and substantive law issues that have been greatly affected by Supreme Court decisions since 1970. Prior to that date there was no federal maritime wrongful death action for recreational boaters killed on territorial waters.[7] Also, at that time, torts were considered maritime as long as they arose on the navigable waters.[8] The Supreme Court has changed both of these rules. There is now a judicially created cause of action for death caused by a maritime tort. On the other hand, torts are no longer maritime just because they arise on navigable waters. The courts have struggled to work out the contours of these doctrinal innovations. In the process, the Supreme Court has called into question the need for admiralty jurisdiction and has challenged the conventional wisdom that the purpose of admiralty jurisdiction is to protect maritime commerce by insuring a uniform substantive law. Additionally, given the Court's increased sensitivity to states' rights, the Court appears to be searching for a compass to guide it in allocating power between federal and state governments in cases arising on or near the water.

This article will examine three developments in the law in admiralty that are important for understanding *Yamaha* and its implications: the scope of the federal courts' jurisdiction over maritime torts, the law of wrongful death in maritime cases, and the ability of federal and state authority to make law in admiralty cases generally.

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4. Calhoun v. Yamaha Motor Corp., U.S.A., 40 F.3d 622 (3d Cir. 1994).

5. Yamaha Motor Corp., U.S.A. v. Calhoun, 116 S. Ct. 619 (1996).

6. 398 U.S. 375, 90 S. Ct. 1772 (1970).

7. *See* The Tungus v. Skovgaard, 358 U.S. 588, 79 S. Ct. 503 (1959). Seamen killed in territorial waters were covered under the Jones Act, 46 U.S.C. 688. The Death on the High Seas Act, codified at 46 U.S.C. § 761, covered any person who died from injuries inflicted outside the territorial waters. Both of these statutes were enacted in 1920.

8. The Plymouth, 70 U.S. (3 Wall.) 20 (1865). *See* 1 Steven Friedell, Benedict on Admiralty § 171 n.4 (1996).

II. MARITIME TORTS

The *Yamaha* case would have been a lot simpler had it been decided before 1970. As mentioned previously, at that time admiralty jurisdiction extended to any tort on the navigable waters. Maritime jurisdiction extended to cases where there was no connection to traditional maritime activity.[9] Even though maritime jurisdiction might therefore have been fortuitous in some instances, the states' prerogatives were not entirely ignored. State law applied to several matters, including the wrongful deaths of non-seamen killed within the territorial waters[10] and survival actions generally.[11] Consequently, prior to 1970, the *Yamaha* case would have resolved simply: the federal courts exercising maritime jurisdiction would have heard the case and applied state law. Oddly enough, the Court in *Yamaha* resolved both the jurisdiction and the choice of law problems in almost the same way. The Court held that the tort was maritime and that state statutes could provide an additional remedy. But jurisdiction is not a game of horseshoes, and the differences between how *Yamaha* was decided and how it would have been decided thirty years ago reveal significant differences in outlook and suggest significant differences in the outcomes of other cases.

It may have seemed self-evident that the admiralty jurisdiction applied to any tort on the navigable waters. If jurisdiction is a territorial-based concept, then that is what Admiralty Courts should do. They should hear tort cases arising in their jurisdiction. However, the territorial theory of tort jurisdiction seemed out of place when compared with the admiralty jurisdiction over contracts. In contrast to the territorial theory of tort jurisdiction, courts applied a subject matter jurisdiction to questions of contract law. A contract is maritime if its subject matter is maritime.[12] The essential question is whether the contract is related to a maritime service or transaction.[13] The place of contracting and the place of performance might be on land, as is true of marine insurance, but the contracts are maritime nonetheless. The subject matter test for maritime contracts has problems of its own.[14] But what matters here is that the contract

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9. *E.g.*, Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (3d Cir.), *cert. denied*, 375 U.S. 940, 81 S. Ct. 343 (1963) (airplane crash); Davis v. City of Jacksonville Beach, Florida, 251 F. Supp. 327 (M.D. Fla. 1965) (injury to a swimmer by a surfboard).

10. *See* The Tungus v. Skovgaard, 358 U.S. 588, 79 S. Ct. 503 (1959).

11. *See* Just v. Chambers, 312 U.S. 383, 61 S. Ct. 687 (1941).

12. Insurance Co. v. Dunham, 78 U.S. (11 Wall.) 1 (1870).

13. *Id.*

14. For example, contracts to build a ship are still regarded as being non-maritime. *E.g.*, J.A.R., Inc. v. M/V Lady Lucille, 963 F.2d 96 (5th Cir. 1992). The doctrine goes back to People's Ferry Co. v. Beers, 61 U.S. (20 How.) 393 (1857). Another problem is that courts have struggled to define which contracts are preliminary to maritime contracts and therefore non-maritime. *E.g.*, E.S. Binnings, Inc. v. M/V Saudi Riyadh, 815 F.2d 660 (11th Cir. 1987); Ingersoll Milling Mach. Co. v. M/V Bodena, 829 F.2d 293 (2d Cir. 1987), *cert. denied*, 484 U.S. 1042, 108 S. Ct. 774 (1988). The Supreme Court overruled earlier authority and has held that agency contracts are not per se non-

cases suggest that courts should exercise admiralty jurisdiction only if there is some purpose in having federal jurisdiction in that area. The idea of purpose was largely absent in the tort cases—all that was needed there was that the tort had occurred on the water, even if the subject matter of the tort did not relate to a maritime service or transaction. Accidents involving surf boards, swimmers, and air craft falling into the sea were maritime even though no purpose was served by extending federal jurisdiction to these cases.[15]

The idea was born that the purpose for admiralty jurisdiction was to have a court with expertise in commercial shipping in order to further the federal interests in the regulation of an industry vital to national interest.[16] Judged by this standard the maritime tort cases were out of place. Maritime tort jurisdiction was too broad. In 1972 the Supreme Court responded to these concerns in *Executive Jet Aviation, Inc. v. City of Cleveland*.[17] The Court noted several problems with the territorial test, but oddly enough, did not jettison it. Instead it added an additional test: did the tort have a substantial connection to traditional maritime activity. The Court held that no sufficient connection existed in cases of "aviation tort claims arising from flights by land-based aircraft between points within the continental United States."[18]

With *Executive Jet*, the Court began a journey to almost nowhere. It looked for a time that the decision might have kept cases out of the admiralty jurisdiction that had little connection to maritime commerce. Pleasure craft cases, such as that in *Yamaha*, have little connection to the federal interest in the business of shipping. But ten years after deciding *Executive Jet* the Court made a sharp turn to port. Over a strong dissent, the five person majority in *Foremost Insurance Co. v. Richardson*[19] held that pleasure craft collisions were within the admiralty jurisdiction. In *Foremost* a collision between two pleasure boats resulted in the death of Clyde Richardson, who was either a passenger or the operator of one of the boats.[20] The majority was concerned that noncommercial maritime activity could have a disruptive effect on maritime commerce. The majority also felt that uniform rules of liability would promote maritime commerce. Finally, they were concerned that a rule limiting jurisdiction to collisions involving commercial vessels would be

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maritime. Exxon Corp. v. Central Gulf Lines, 500 U.S. 603, 111 S. Ct. 2071 (1991). The case may signal a willingness to extend admiralty jurisdiction to other types of contracts.

15. *See supra* note 9.

16. *See, e.g.*, Charles L. Black, Jr., *Admiralty Jurisdiction: Critique and Suggestions*, 50 Colum. L. Rev. 259 (1950).

17. 409 U.S. 249, 93 S. Ct. 493 (1972).

18. *Id.* at 273, 93 S. Ct. at 507.

19. 457 U.S. 668, 102 S. Ct. 2654 (1982).

20. 457 U.S. at 669, 102 S. Ct. at 2655. The lower court opinions neither give Mr. Richardson's full name nor mention that he died. Another person on Mr. Richardson's boat, June Allen, was injured. Richardson's wife and children sued Ms. Allen, the operator of the other boat and the latter boat's insurer. Ms. Allen counterclaimed. Ms. Allen's attorney informed me that he pursued the issue of admiralty jurisdiction because the state statute of limitations on torts had run. Interview with Victor Marcello, Esq. (October 18, 1996).

uncertain and confusing. The more conservative dissenters, including Justices Rehnquist and O'Connor, argued that expanding admiralty jurisdiction to pleasure boating displaced state law making responsibility.

All justices of the *Foremost* court agreed that there was a need for uniform rules of the road and all justices assumed that extending admiralty jurisdiction to pleasure boating meant displacing state substantive law. The majority thought that application of state rules of liability would somehow undermine these standards.[21] The dissenters thought that rules of the road could be fixed by Congress but that concerns for federalism should keep the courts from displacing state substantive law.

We will shortly return to *Foremost*, for that decision is seriously compromised by *Yamaha*. But first let us complete the voyage begun in *Executive Jet*. For eight years following *Foremost* the Supreme Court left the lower courts to their own devices. Most courts followed some variation of the *Kelly* test devised by the Fifth Circuit.[22] This test listed several factors to be considered in determining whether a case had sufficient connection to traditional maritime activity.[23] The factors were sufficiently vague such that one could use them to justify almost any result.[24] Despite this shortcoming, the pattern established by the cases suggested that cases would be outside the admiralty jurisdiction if they involved only land-based parties whose injuries could have occurred in an essentially identical way on land. In the 1990 decision, *Sisson v. Ruby*,[25] the

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21. This is a dubious assumption. Most boaters are motivated to engage in safe practices by a desire to avoid accidents, not by the desire to avoid liability. It is highly doubtful that a state rule of contributory negligence or a state rule capping the award of non-economic losses will encourage boaters to act carelessly. Faced with an oncoming boat, it is rather far-fetched to assume that one would disregard the rules of the road because of one's awareness that under state law one's liability (to the extent one is not insured) will be less than maritime law. Even if we assume that rules of liability did enter one's consciousness at times like these, it is possible that rules of contributory negligence and caps on liability promote overall safety. If the about-to-be injured plaintiff were fully aware of the limits on recovery, she would take safety precautions. *Cf.* Preble Stolz, *Pleasure Boating and Admiralty: Erie at Sea*, 51 Cal. L. Rev. 661, 712-14 (1963) (discussing accommodation of state and federal law relating to pleasure boat liability).

22. Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973) (2-1 decision), *cert. denied*, 416 U.S. 969, 94 S. Ct. 1991 (1974). Among the decisions adopting the *Kelly* test were: Drake v. Raymark Indus., 772 F.2d 1007 (1st Cir. 1985), *cert. denied*, 476 U.S. 1126, 106 S. Ct. 1944 (1986); Oman v. Johns-Manville Corp., 764 F.2d 224 (4th Cir.) (en banc), *cert. denied*, 474 U.S. 971, 106 S. Ct. 351 (1985); T.J. Falgout Boats, Inc. v. United States, 508 F.2d 855 (9th Cir. 1974), *cert. denied*, 421 U.S. 1000, 95 S. Ct. 2398 (1975). *See generally* Friedell, *supra* note 8, at § 171 n.48.

23. The factors were: 1) the functions and roles of the parties; 2) the types of vehicles and instrumentalities involved; 3) the causation and type of injury; and 4) traditional concepts of the role of admiralty law. In Molett v. Penrod Drilling Co., 826 F.2d 1419 (5th Cir. 1987), *cert. denied*, 493 U.S. 1003, 110 S. Ct. 563 (1989), the Court added three additional factors: 1) the impact of the event on maritime shipping and commerce; 2) the desirability of a uniform national rule to apply to such matters; and 3) the need for admiralty "expertise" in the trial and decision of the case.

24. *See* Friedell, *supra* note 8, § 171 text, at nn.52 and 53.

25. 497 U.S. 358, 367 n.4, 110 S. Ct. 2892, 2897 n.4 (1990) (*Kelly* test not abblicable, at least where all relevant entities are engaged in the similar types of activity).

Supreme Court seemed to disapprove of the *Kelly* test and five years later in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*,[26] the Court finally rejected it. In its place the Court created a two-part test for determining maritime connection.[27] First, to be within the admiralty jurisdiction the incident must be of the sort that has the potential to disrupt maritime commerce.[28] Second, the tortfeasor's activity must be "so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply to the case at hand."[29] Because parties could easily characterize the incident and the activity in widely different ways, the Court stressed that the test is not intended to be a "vehicle for eliminating admiralty jurisdiction,"[30] and that "[t]he test turns on the comparison of traditional maritime activity to the arguable maritime character of the tortfeasor's activity."[31] In other words, the balance is struck in favor of exercising admiralty jurisdiction. Mindful that admiralty jurisdiction might thus be extended into areas of state concern, the Court asserted that "federal admiralty courts sometime do apply state law."[32] The Court has thus returned almost to its point of origin in *Executive Jet*. Cases arising on the navigable waters will almost always be within the admiralty jurisdiction if some type of watercraft is involved. The overreach of federal adjudicatory jurisdiction is balanced by sensitivity to applying state law where appropriate.

The effect of *Sisson* and *Grubart* is that courts will be presumed to have admiralty jurisdiction in cases involving any type of vessel on navigable waters. In place of a simple locality test which extended admiralty jurisdiction too broadly, the Court has substituted a "locality plus" test which eliminates certain airplane cases and a few others which have no relationship to the business of shipping.

Following *Grubart* there was little question that the *Yamaha* case was within the admiralty jurisdiction, and the Calhouns only faintly argued to the contrary.[33] Because a jet ski is a type of vessel, however small, and because the death occurred on the navigable waters, jurisdiction was a foregone conclusion. The Supreme Court settled the issue in one sentence, citing *Sisson* and *Foremost*.[34]

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26. 115 S. Ct. 1043 (1995).

27. *Grubart* made it clear that the requirement of maritime locality must also be established. 115 S. Ct. at 1048. For a detailed examination of the test under *Grubart*, see Thomas C. Galligan, Jr., *Of Incidents, Activities, and Maritime Jurisdiction: A Jurisprudential Exegesis*, 56 La. L. Rev. 519 (1996).

28. *Grubart*, 115 S. Ct. at 1048.

29. *Id.* at 1051.

30. *Id.* at 1052.

31. *Id.*

32. *Id.* at 1054.

33. Brief for Respondents at 34, Yamaha Motor Corp., U.S.A. v. Calhoun, 116 S. Ct. 619 (1996) (94-1387) ("Indeed, it is arguable that the tort here is not a maritime tort at all.").

34. The Court said simply, "Because this case involves a watercraft collision on navigable waters, it falls within admiralty's domain." 116 S. Ct. at 623.

At first glance *Foremost* and *Yamaha* are not in conflict. *Foremost* holds that collisions of even non-commercial vessels on the navigable waters are within the admiralty jurisdiction; *Yamaha* holds that state wrongful death laws may supplement federal wrongful death remedies. But on further examination, the two cases are a disturbing pair. All the justices in *Foremost*, a case involving wrongful death, assumed that federal jurisdiction preempts state law. Indeed the majority thought that extending jurisdiction to pleasure boating had the purpose of preempting state law so that "vessel operators [would be] subject to the same duties and liabilities"[35] which would not vary depending on which state they were situated. But the unanimous decision in *Yamaha* held that even though the collision of watercraft is within the admiralty jurisdiction, the measure of damages imposed by state wrongful death statutes is not preempted. Under *Yamaha*, federal law does not wholly preempt state law, but it does add a floor to recovery. States may increase but not decrease the recoverable damages. *Yamaha* thus frustrates the purpose of *Foremost*, to subject all vessel operators to the same liability regardless of differing state laws.

Yamaha goes even further. In its last footnote the *Yamaha* opinion draws a distinction between rules on remedies and rules of liability.[36] The opinion purports to deal only with rules on remedies—damages in this instance. By contrast, the footnote leaves open the possibility that state rules governing liability may apply in admiralty and asserts that such has been the case in wrongful death cases, citing *Hess v. United States*[37] and *The Tungus v. Skovgaard*.[38] This comes as a surprise. As explained in the next section, *Hess* and *The Tungus* had been thought to be overruled. But aside from that, *Foremost* assumed that admiralty jurisdiction would preempt state liability rules and insisted that federal law fix the duties and liabilities in pleasure boat cases. By contrast, *Yamaha* suggests that state liability rules may hold sway, not only in wrongful death cases, but in personal injury cases as well. If state rules governing liability apply, then the purpose given in *Foremost* for having admiralty jurisdiction over non-commercial collisions is largely frustrated. All that would be left of the *Foremost* rationale is the concern that the line dividing commercial from pleasure craft is an uncertain line.

If *Foremost* and *Yamaha* both remain good law, then the paradox will be that the dissenters in *Foremost* will have achieved more than they intended. Despite their fears that federal power would displace state prerogatives, federal jurisdiction will not preempt state wrongful death remedies that provide more

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35. Foremost Ins. Co. v. Richardson, 457 U.S. 668, 676, 102 S. Ct. 2654, 2659 (1982). This was echoed in *Sisson v. Ruby* where the Court said, "[t]he need for uniform rules of maritime conduct and liability is not limited to navigation, but extends at least to any other activities traditionally undertaken by vessels, commercial or noncommercial." Sisson v. Ruby, 497 U.S. 358, 367, 110 S. Ct. 2892, 2898 (1990).

36. *Calhoun*, 116 S. Ct. at 629 n.14.

37. 361 U.S. 314, 80 S. Ct. 341 (1960).

38. 358 U.S. 588, 79 S. Ct. 503 (1959).

liberal recoveries. Furthermore, these more liberal state remedies will be applied to all cases within the admiralty jurisdiction—not just to those involving non-commercial vessels. Beyond that, state power would be greatly increased if the Court ultimately decides that state rules of liability may be applied to all maritime tort cases, including non-fatal injuries.

III. WRONGFUL DEATH

The problem of maritime wrongful death has long plagued the courts. Although the Supreme Court ruled in the 1886 case *The Harrisburg*[39] that no right to sue for wrongful death existed in admiralty, such actions were allowed in state court and in diversity actions brought in the Circuit Court.[40] The Supreme Court finally decided in 1921 that state wrongful death statutes could be applied in admiralty.[41] It followed suit twenty years later in holding that state survival statutes could be given effect in admiralty.[42] All of this might have caused little trouble except that the Supreme Court created a strict liability claim for seamen and longshore workers injured by an unseaworthy vessel.[43]

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39. 119 U.S. 199, 7 S. Ct. 140 (1886). The Supreme Court held that the general maritime law provided no recovery for wrongful death. Such actions can only be provided by statute. In this case the plaintiff's decedent died in Massachusetts waters and the vessel, which was sued in rem, had its home port in Philadelphia. Although the Court did not decide the matter, its opinion suggested that admiralty courts might enforce a state statute for wrongful death. However, the statutes of limitations of the Massachusetts and Pennsylvania statutes had run before suit was brought.

40. In American Steamboat Co. v. Chase, 83 U.S. (16 Wall.) 522 (1872), the Supreme Court allowed actions for wrongful death to be brought in state court under the saving to suitors clause, which saved "the right of a common-law remedy where the common law is competent to give it." *Id.* at 524. The Court rejected the argument that wrongful death actions were unknown to the common law by holding that state wrongful death statutes only prevented a "failure of justice." *Id.* The statutes corrected the common law's failure to recognize that actions for personal injury survived the death of the injured party.

In The Hamilton, 207 U.S. 398, 28 S. Ct. 133 (1907), the Court went a step farther, allowing suits for wrongful death based on state statutes to be brought in Limitation of Liability actions filed in admiralty. Again the Court did not decide whether such actions could be brought in admiralty generally. But the opinion by Justice Holmes said that recognizing such suits in admiralty would not produce "any lamentable lack of uniformity." *Id.* at 406, 28 S. Ct. at 135. A case decided the following year, La Burgogne, 210 U.S. 95, 28 S. Ct. 664 (1908), enforced a French wrongful death action in a limitation of liability suit. In Southern Pacific Co. v. Jensen, 244 U.S. 205, 37 S. Ct. 524 (1917), the Court listed wrongful death actions as among those matters that can be changed, modified, or affected by state legislation, citing *The Hamilton* and *La Burgogne*. Finally, in Western Fuel Co. v. Garcia, 257 U.S. 233, 42 S. Ct. 89 (1921), the Court upheld the right to sue in admiralty under state wrongful death acts. The states had the power to make "some modifications or supplements" in this area and since the death occurred within a state, the matter was "maritime and local" in character. *Id.* at 241-42, 42 S. Ct. at 90.

41. Western Fuel Co. v. Garcia, 257 U.S. 233, 42 S. Ct. 89 (1921).

42. Just v. Chambers, 312 U.S. 383, 61 S. Ct. 687 (1941).

43. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S. Ct. 926 (1960); Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872 (1946); Mahnich v. Southern S.S. Co., 321 U.S. 96, 64 S. Ct. 455 (1944).

The Court created more confusion by holding that the Jones Act[44] preempted state statutes from giving recovery for the wrongful death of a seaman caused by unseaworthiness.[45] This put longshore workers in a better position than seamen. Since longshore workers were not covered by the Jones Act, the estates of longshore workers killed by unseaworthiness were able to recover under state wrongful death statutes if those statutes applied. The problem was that unseaworthiness was a maritime concept and not a common law tort.[46] Could there be recovery for unseaworthiness if the state wrongful death statute did not encompass unseaworthiness? A five-member majority of the Court said "no" in *The Tungus v. Skovgaard*.[47] It based its holding on *The Harrisburg*'s statement, "if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence."[48]

The Tungus created severe difficulties. One year later in *Hess v. United States*,[49] a badly divided court decided that Oregon's employer liability law would be given effect in admiralty even though it created a higher standard of care than maritime law provided. This time the four *Tungus* dissenters joined the majority but "solely under compulsion of the Court's ruling" in *The Tungus*.[50] In addition, three justices who had joined the majority in *The Tungus* now dissented. In short, a majority of the Court thought that the result in *Hess* was wrong. Finally, in *Moragne v. States Marine Lines*,[51] the Supreme Court overruled *The Harrisburg* and created a federal wrongful death remedy.

Moragne involved a longshore worker who was killed while working aboard a vessel in territorial waters in Florida. The federal District Court dismissed the unseaworthiness count but certified the question to the former Fifth Circuit. The Court of Appeals, in turn, certified the question to the Florida Supreme Court. The Florida Supreme Court advised the Court of Appeals that Florida's wrongful death statute did not provide recovery for deaths caused by unseaworthiness.[52] The Fifth Circuit thereupon affirmed the District Court's order, stating that it was

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44. 46 U.S.C. § 688 (1994).

45. Gillespie v. United States Steel Corp., 379 U.S. 148, 85 S. Ct. 308 (1964). Seamen could recover for non-fatal injuries caused by unseaworthiness. Also, seamen's estates could recover for deaths outside the territorial waters caused by unseaworthiness under the Death on the High Seas Act.

46. Unseaworthiness was known to the common law. Although its use as the basis for a maritime tort for personal injury is of twentieth century origin, the concept is an ancient one in the context of marine insurance and cargo damage. English common law courts exercised jurisdiction over these disputes. *See* Grant Gilmore & Charles Black, Jr., The Law of Admiralty § 1-4 (2d ed. 1975).

47. 358 U.S. 588, 79 S. Ct. 503 (1959).

48. 358 U.S. at 592, 79 S. Ct. at 506 (quoting The Harrisburg, 119 U.S. 199, 213, 7 S. Ct. 140, 147 (1886)).

49. 361 U.S. 314, 80 S. Ct. 341 (1960).

50. *Id.* at 321, 80 S. Ct. at 347.

51. 398 U.S. 375, 409, 90 S. Ct. 1772, 1792 (1970).

52. Moragne v. States Marine Lines, 211 So. 2d 161 (Fla. 1968).

bound by *The Tungus*.[53] The United States Supreme Court reversed. In a unanimous opinion written by Justice Harlan, it overruled *The Harrisburg* and held "that an action does lie under general maritime law for death caused by violation of maritime duties."[54]

The issue in *Yamaha* was whether *Moragne* preempted state wrongful death statutes. The unanimous Court held that it did not. It reasoned that *Moragne* established a floor but not a ceiling on wrongful death recoveries. Apparently, the Court agreed with the Third Circuit's assessment that *Moragne* only overruled *The Harrisburg* but left *The Tungus* and *Hess* undisturbed.[55]

It would seem that there are three ways of evaluating the *Yamaha* Court's reading of *Moragne*. One way is simply that the Court was correct. *Moragne* created a floor but not a ceiling. This view finds support in pre-*Moragne* cases suggesting that federal courts used state wrongful death laws because state law may "supplement" admiralty law when the matter is maritime but local.[56] Even though *Moragne* created a new right of wrongful death it did not stop states from supplementing the law. A second way would be that the Court was wrong because pre-*Moragne* admiralty courts used state wrongful death laws only to fill a gap in the maritime law.[57] Since *Moragne* filled this gap there was now no reason left to apply state law. As David Robertson has shown, it is impossible to decide whether the "maritime but local" theory or the "gap" theory is the correct one.[58] If the pre-*Moragne* cases are seen as merely failing to provide remedy, then the gap theory is correct. But if these early cases are seen as holding that the general maritime law exempts defendants for wrongful death, then the supplemental theory is correct. Of course, any rule denying recovery in a particular case does two things: it fails to provide a remedy and affirmatively creates an exemption.

A third approach would be to look at what *Moragne* says about the issue. In its brief in *Yamaha*, the United States suggested to the Court that *Moragne* had "no occasion" to consider whether state wrongful death laws may continue to be used.[59] But the Supreme Court, like the Third Circuit, looked to *Moragne*

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53. Moragne v. States Marine Lines, 409 F.2d 32 (5th Cir. 1969). Justice Blackmun did not participate in the case.

54. 398 U.S. at 409, 90 S. Ct. at 1792.

55. As previously mentioned, the last footnote of the Court's opinion in *Yamaha* said that state liability standards, as opposed to rules on remedies, hold sway in wrongful death cases, citing *Hess* and *The Tungus*. Yamaha Motor Corp., U.S.A. v. Calhoun, 116 S. Ct. 619, 629 n.14 (1996).

56. *See, e.g.*, Western Fuel Co. v. Garcia, 257 U.S. 233, 241, 42 S. Ct. 89, 90 (1921) ("the power of a state to make some modifications or supplements was affirmed [by the *Jensen* line of cases]"). *See infra* text accompanying notes 83-86.

57. The United States made this argument to the Court in *Yamaha*. Brief for the United States as Amicus Curiae at 14, *Yamaha* (94-1387).

58. David W. Robertson, *Displacement of State Law by Federal Maritime Law*, 26 J. Mar. L. & Com. 325, 340-41 (1995).

59. Brief for the United States as Amicus Curiae at 13, *Yamaha* (94-1387). Nonetheless the United States argued that state remedies should not be applicable. *Id.* Their reason was that prior

for clues. The Supreme Court in *Yamaha* supported its view that states could provide additional remedies for wrongful death by observing that *Moragne* "notably left in place the negligence claim [Petsonella Moragne, the personal representative and widow] had stated under Florida law."[60] The Court of Appeals in *Yamaha* paraphrased a statement in *Moragne*, saying "the Moragne Court 'concluded that the primary source of the confusion [in the law of maritime wrongful deaths] is not to be found in *The Tungus*, but in *The Harrisburg*.'"[61] From this the Third Circuit concluded that *The Tungus*' holding that rights of non-seamen killed in state territorial waters depend on state statutes "retains vitality post-*Moragne*."[62]

Both of these clues from *Moragne* are far from clear. First, *Moragne* left the Florida negligence claim alone because it was not before the Court. As noted by the *Yamaha* Court, the Court of Appeals in *Moragne* heard the case pursuant to a 28 U.S.C. § 1292(b) certification directed solely to the District Court's order dismissing the unseaworthiness claim.[63] However, the holding in *Moragne* was not limited to unseaworthiness. The Court held "that an action does lie under general maritime law for death caused by violation of maritime duties."[64] As recognized by the *Yamaha* Court, this encompasses not only unseaworthiness but also products liability and negligence.[65] Thus, if *Moragne* precludes state wrongful death law for unseaworthiness, then on remand Mrs. Moragnes' claim for negligence should also have been decided under federal standards.

The second clue from *Moragne*, that it found the "primary source of the confusion" in *The Harrisburg*, not in *The Tungus*, is also not clear evidence that it intended to leave *The Tungus* standing. The language must be understood in context. In both the Court of Appeals and in her petition for certiorari, Mrs. Moragne had challenged the validity of *The Tungus*, but not the validity of *The Harrisburg*. The Supreme Court requested the parties and the United States, which the Court had invited to participate as amicus curiae, to brief the issue of whether it should overrule *The Harrisburg*. After recounting the division in the Court in *The Tungus*, the Court continued:

> The extent of the role to be played by state law under *The Tungus* has been the subject of substantial debate and uncertainty in this Court, see Hess v. United States, 361 U.S. 314, 80 S.Ct. 341, 4 L.Ed.2d 305

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to *Moragne* state law filled a gap that *Moragne* closed. *Id.* at 14. By contrast, Yamaha argued that *Moragne* rendered *The Tungus* moot and "intended to provide a uniform maritime wrongful death remedy." Brief for Petitioners at 38-39, *Yamaha* (94-1387).

60. 116 S. Ct. at 627-28.

61. Calhoun v. Yamaha Motor Corp., U.S.A., 40 F.3d 622, 641 n.39 (3d Cir. 1994) (quoting Moragne v. States Marine Lines, 398 U.S. 375, 378, 90 S. Ct. 1772, 1776 (1970)).

62. 40 F.3d 622 at 641 n.39.

63. 116 S. Ct. at 628 n.12. *See Moragne*, 398 U.S. at 376, 90 S. Ct. at 1775.

64. 398 U.S. at 409, 90 S. Ct. at 1792.

65. 116 S. Ct. at 627 n.11.

> (1960); Goett v. Union Carbide Corp., 361 U.S. 340, 80 S.Ct. 357, 4 L.Ed.2d 341 (1960), with opinions on both sides of the question acknowledging the shortcomings in the present law. See 361 U.S., at 314-315, 338-339, 80 S.Ct., at 343, 356. On fresh consideration of the entire subject, we have concluded that the primary source of the confusion is not to be found in *The Tungus*, but in *The Harrisburg*, and that the latter decision, somewhat dubious even when rendered, is such an unjustifiable anomaly in the present maritime law that it should no longer be followed. We therefore reverse the judgment of the Court of Appeals.[66]

The "confusion" referred to is not just the confusion of "law of maritime wrongful deaths" as the Third Circuit thought, but the "extent of the role to be played by state law under *The Tungus*."[67] Seen in this way, it is not at all clear that the Court meant to keep *The Tungus* alive to provide additional recoveries over those allowed by federal law. It would be rather odd if it had, because Justice Harlan, the author of *Moragne*, had dissented in *Hess* on the grounds that states could not prescribe a higher standard of care than that required by maritime law.[68] Moreover, the *Moragne* Court went on to rule that Mrs. Moragne's "challenge to *The Tungus* is properly before us on certiorari, and, of course, it subsumes the question of the continuing validity of *The Harrisburg*, upon which *The Tungus* rests."[69] Later, the Court referred to *The Tungus* as the "corollary" of *The Harrisburg*."[70] If *The Tungus* "rests" on *The Harrisburg*, and is its corollary, then with the overruling of *The Harrisburg*, the latter case is left hanging in mid-air.

Indeed, *Moragne* provides ample evidence that the Court intended the new federal wrongful death remedy to preempt state law. The *Moragne* Court noted that the creation of a right to recover under general maritime law "will assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts."[71] If *Moragne* meant to preserve state damages for wrongful death it would be defeating these goals.[72]

Further evidence of *Moragne*'s intent can be gleaned from its statement that "[f]ederal law, rather than state, is the more appropriate source of a remedy for

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66. *Moragne*, 398 U.S. at 378, 90 S. Ct. at 1776 (footnote omitted).

67. *Id.*

68. Hess v. United States, 361 U.S. 314, 322, 80 S. Ct. 341, 347 (1960).

69. *Moragne*, 398 U.S. at 378 n.1, 90 S. Ct. at 1776 n.1 (end of footnote).

70. 398 U.S. at 404, 90 S. Ct. at 1790.

71. 398 U.S. at 401, 90 S. Ct. at 1788.

72. The *Yamaha* Court gave this language of *Moragne* a limited effect. It said, "[t]he Court surely meant to 'assure uniform vindication of federal policies'. . . with respect to the matters it examined." 116 S. Ct. at 627. By this the *Yamaha* Court referred to the anomalies created by the lack of a maritime wrongful death recovery for unseaworthiness.

violation of the federally imposed duties of maritime law."[73] Moreover, the Court said that *The Harrisburg* "in conjunction with its corollary, *The Tungus*, has produced a litigation-spawning confusion in an area that should be easily susceptible of more workable solutions. . . . To supplant the present disarray in this area with a rule both simpler and more just will further, not impede, efficiency in adjudication."[74] All of this language in *Moragne* strongly suggests that the Court intended the new federal cause of action to replace the use of state law and not to be a gap-filling measure as the *Yamaha* Court read it.[75] Most courts[76] and treatises[77] read *Moragne* that way.

Although *Yamaha* is inconsistent with the purpose of *Moragne*, the differences may be contained. As mentioned before, the *Yamaha* Court limited its holding to allowing state-created remedies, including damages, that exceed the remedies under federal law. It left open the possibility that federal law might govern exclusively the determination of liability standards.[78] Whether the Court will take such a step depends to some extent on its overall view of the role of state and federal governments in fashioning law in admiralty cases. We will deal with that question in the next section.

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73. 398 U.S. at 401 n.15, 90 S. Ct. at 1788 n.15.

74. 398 U.S. at 404, 90 S. Ct. at 1790.

75. 116 S. Ct. at 628.

76. *E.g.*, Wahlstrom v. Kawasaki Heavy Indus., Ltd., 4 F.3d 1084, 1089, (2d Cir. 1993) (collecting cases); In re S/S Helena, 529 F.2d 744 (5th Cir. 1976); Nelson v. United States, 639 F.2d 469 (9th Cir. 1980); Texaco Refining & Marketing, Inc. v. Estate of Dau Van Tran, 808 S.W.2d 61 (Tex. 1991); Bell v. Bahr-DeRose, Inc., 1982 AMC 1185 (N.J. Super. Ct. 1981), *cert. denied*, 93 N.J. 273 (1983). The Third Circuit's decision in *Calhoun* was the first federal decision of its kind. *See also* Texaco Refining & Marketing, Inc. v. Estate of Dau Van Tran, 777 S.W.2d 783 (Tex. Ct. App. 1989) (applying state law), *vacated*, 497 U.S. 1020, 110 S. Ct. 3266 (1990). Under *Moragne*, state wrongful death acts were to be used as one guide in fashioning the maritime remedy. 398 U.S. at 408, 90 S. Ct. at 1791-92.

77. Friedell, *supra* note 8, § 113; Thomas Schoenbaum, Admiralty & Maritime Law 412 (2d ed. 1994); 2 Alexander Sann et al., Benedict on Admiralty § 81, at 7-14 (1984) (lower courts dispute whether in fashioning the maritime remedy greater deference should be given to state or federal remedies but "both schools of thought held that a *Moragne*-type action preempted the operation of state wrongful death acts"); Grant Gilmore & Charles Black, The Law of Admiralty § 6-32 (2d ed. 1975). *Contra* C.A. Wright, A.R. Miller & E.H. Cooper, Federal Practice and Procedure § 3672 (Supp. 1992). Wright and Miller based their view on a reading of Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 106 S. Ct. 2485 (1986). *Tallentire* held that the Death on the High Seas Act preempted state wrongful death statutes from applying to deaths on the high seas. Wright and Miller concluded from this that state law would apply to deaths from injuries in territorial waters. This conclusion would have been correct before *Moragne*. The issue is whether *Moragne* changed the outcome.

78. 116 S. Ct. at 629 n.14. The Solicitor General's brief in *Moragne* took the position that overruling *The Harrisburg* would produce a "uniform non-statutory action" that "would permit the application of a single standard of conduct to govern both fatal and non-fatal injuries in all personal injury actions." The brief further pointed out that such a rule would rectify the "equally anomalous situations in which a differing standard of liability has been required by State law." Brief for the United States as Amicus Curiae at 21, *Yamaha* (94-1387).

IV. FEDERALISM AND ADMIRALTY

We have suggested in the previous two sections that the Court's decision in *Yamaha* is inconsistent with the rationale of *Foremost* in extending admiralty jurisdiction to pleasure boating accidents and that it ignores the intention of *Moragne* to replace state wrongful death statutes with a uniform federal scheme. How could the Court reach such a result? Some of the questions raised at the oral argument suggest that at least one member of the Court felt that there is little, if any, federal interest in denying recovery of lost future earnings to the family of a twelve-year old girl against the manufacturer of a jet ski.[79] This is a legitimate concern. Neither the child nor the jet ski manufacturer are involved in the business of shipping. Their dispute is within the admiralty jurisdiction only because of *Foremost*'s concern that admiralty jurisdiction needs to include pleasure boating because of the effects pleasure boaters have on commercial traffic. But the dispute between the parties in *Yamaha*—a products liability suit about a recreational product—is the kind of dispute routinely resolved by state law.[80]

The result in *Yamaha*—that the parents are given a chance that Pennsylvania's liberal survival action will apply[81]—is consistent with this concern. However, the holding in *Yamaha* is quite different. First, it applies even to situations where the federal interest predominates. For example, state wrongful death law that expanded damage recovery beyond *Moragne* would govern commercial vessel owners who cause the death of passengers or recreational boaters in territorial waters. Second, *Yamaha* does not allow all state laws to trump federal laws even in situations where the state interest predominates. For example, if state law were to limit wrongful death recoveries more than federal law, *Yamaha* would still insist that the federal law be given effect.

Yamaha is the latest in a series of cases where the Supreme Court has redefined the roles of federal and state governments in making admiralty law. The *Yamaha* Court asserted that its decision would "attempt no grand synthesis

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79. "[W]hat is the Federal interest in uniformity in connection with a jet ski accident in territorial waters? Why do we need to apply admiralty law and seek uniformity? Why isn't that much closer to traditional State negligence actions, where State law should govern?" Oral Arguments, 1995 WL 648001 at 10-11, *Yamaha* (94-1387). "Why can't State law apply up until the point where there's a genuine collision with some authentic Federal interest?" *Id.* at 25. Justice Kennedy apparently raised the concern. *Id.* at 38.

80. As stated in the Third Circuit decision in *Yamaha*:

> To accept Yamaha's position in this case would create the opposite of the problem faced in *Moragne*, for we would be grafting a compensation scheme designed principally for seamen onto cases that fit easily within the tort systems developed by the states. This case is, at base, no different than a cause of action arising out of the average motor vehicle accident.

Calhoun v. Yamaha Motor Corp., U.S.A., 40 F.3d 622, 644 (3d Cir. 1994).

81. On remand the District Court will have to decide whether to apply the law of Puerto Rico or Pennsylvania.

or reconciliation" of the precedents.[82] The decision, however, is bound to influence future decisions in this troubled area.

Some background is necessary to appreciate where the *Yamaha* Court was coming from and where it has left us. Since 1917 the federal government has predominated in making admiralty law. In that year the Court decided *Southern Pacific Co. v. Jensen*[83] which struck down New York's workers compensation law as applied to longshoremen injured aboard ships on navigable waters. The Court laid down three rules: 1) state law cannot "contravene the essential purpose expressed by an act of Congress"; 2) state law cannot work "material prejudice to the characteristic features of the general maritime law"; and 3) state law cannot interfere "with the proper harmony and uniformity of that law in its international and interstate relations."[84] Beyond that the Court gave several examples drawn from previous cases of permissible and impermissible state laws. As previously mentioned, state laws could create remedies in wrongful death cases. Additionally, state statutes can create liens on vessels repaired in their home ports, and state law may regulate pilotage fees. However, states may not create *in rem* proceedings and may not create liens on foreign ships.

Jensen was extended one year later to preclude state tort from applying to seamen injured at sea.[85] Two years after that, in *Knickerbocker Ice v. Stewart*,[86] the Court held that Congress cannot evade *Jensen* by delegating to the states the authority to create workers compensation for longshore workers. Perhaps the high water mark of *Jensen* was reached in 1953 when the Court in *Pope & Talbot Inc. v. Hawn*[87] declared that Pennsylvania's contributory negligence doctrine could not be applied to a land-based contractor who worked for a repair company that contracted to repair a vessel that was berthed at a pier in Philadelphia. Because his injury constituted a maritime tort, the Constitution had placed his cause of action "under national power to control in 'its substantive as well as its procedural features.'"[88] Federal power "is dominant in this field."[89] "While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretive decisions of [the Supreme Court.]"[90]

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82. 116 S. Ct. at 626 n.8.

83. 244 U.S. 205, 37 S. Ct. 524 (1917).

84. The Court adopted these three rules with slight modification and without attribution from City of Norwalk, 55 F. 98, 106 (S.D.N.Y. 1893).

85. Chelentis v. Luckenbach S.S. Co., 247 U.S. 372, 38 S. Ct. 501 (1918).

86. 253 U.S. 149, 40 S. Ct. 438 (1920). *See also* Washington v. W.C. Dawson & Co., 264 U.S. 219, 44 S. Ct. 302 (1924).

87. 346 U.S. 406, 74 S. Ct. 202 (1953).

88. 346 U.S. at 409, 74 S. Ct. at 205 (quoting Panama R. Co. v. Johnson, 264 U.S. 375, 386, 44 S. Ct. 391, 393 (1924)).

89. 346 U.S. at 410, 74 S. Ct. at 205.

90. *Id.* at 409-10, 74 S. Ct. at 205.

From the start *Jensen* was riddled by inconsistencies and subjected to heavy criticism. *Jensen* itself could not satisfactorily explain why some state laws were given effect and others not. Why, for example, could state wrongful death law be applied in admiralty but not state workers compensation law? *Jensen* itself acknowledged that "it would be difficult, if not impossible, to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation."[91] It is unlikely that a test, unable from the start to explain the state of the law, would provide a more certain guide in later cases. Four justices dissented in *Jensen*.[92] On the other hand, *Jensen*'s strength may have been the flexibility it gave courts.

Justice Holmes dissented in *Jensen*, arguing that states have the dominant role in fashioning maritime law. He wrote: "The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasisovereign that can be identified . . . . It always is the law of some State . . . ."[93] But Justice Holmes did not insist that state law always controlled maritime cases. He thought that state law did not apply to some admiralty issues because the District Courts "regarded their jurisdiction as limited by ancient lines."[94] The four *Jensen* dissenters insisted that at the very least state courts were free to apply state law even if it differed from the maritime rule.

Criticism of *Jensen* continued unabated. In *Just v. Chambers*, decided in 1941, the Court referred with approval to a long list of state regulations that were given effect in admiralty in *City of Norwalk*,[95] a late nineteenth-century District Court case. The list included liens for expenses of seamen at a quarantine hospital, regulation of rivers, harbors, and wharves, the protection of fisheries, quarantine laws, and establishing and regulating ferries.[96] Further, *Jensen's* holding even as applied to workers compensation cases was eroded in 1943 by the creation of the "twilight zone"—where recovery could be had under both federal and state workers compensation laws when it was doubtful which one applied.[97] A few months later, the Court said that *Jensen* had been "severely limited and has no vitality beyond that which may continue as to state workmen's compensation laws."[98]

In 1955, the Court upheld the application of state law that regulates marine insurance in the absence of an established federal admiralty rule.[99] The Court stressed that Congress had established a policy of deferring to states in regulating

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91. Southern Pacific Co. v. Jensen, 244 U.S. 205, 216, 37 S. Ct. 524, 529 (1917).

92. *Id.* at 255, 37 S. Ct. at 544.

93. *Id.* at 222, 37 S. Ct. at 531.

94. *Id.*

95. 55 F. 98 (S.D.N.Y. 1893).

96. The Court had upheld the state inspection of vessels when the state regulations did not conflict with federal statutes. Kelly v. Washington, 302 U.S. 1, 58 S. Ct. 87 (1937).

97. Davis v. Department of Labor & Industries, 317 U.S. 249, 63 S. Ct. 225 (1942).

98. Standard Dredging Corp. v. Murphy, 319 U.S. 306, 63 S. Ct. 1067 (1943). This case upheld the rights of states to collect unemployment taxes from maritime employers.

99. Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 75 S. Ct. 368 (1955).

insurance matters. Without ever citing *Jensen* or *Knickerbocker Ice*, the Court in a footnote summarily dismissed as "lacking in merit" the argument that the Constitution forbade states to regulate marine insurance.[100] Moreover the opinion said, "[i]n the field of maritime contracts as in that of maritime torts, the National Government has left much regulatory power in the States," and gave a "But cf." reference to *Pope & Talbot* which it decided just two years earlier.[101]

Later, in 1973, the Court again recognized the power of Congress to confer power on the states to regulate maritime affairs—in this instance maritime pollution.[102] This time the Court addressed *Jensen* and *Knickerbocker Ice*, saying that they "have been confined to their facts, viz., to suits relating to the relationship of vessels playing the high seas and our navigable waters, and to their crews."[103]

Some courts have tried to apply *Jensen* by balancing the interests between the federal and state laws that are in conflict.[104] The difficulty with this approach is that it requires courts to weigh incommensurable policies.[105] But courts frequently resort to this type of balancing, and the approach retains its appeal as courts are unwilling to enforce a federal law in the face of what it senses is a strong state interest.

There the matter stood for several years. Summing up the situation, Professors Gilmore and Black remarked in 1957 and again in 1975:

> [T]he line will still have to be drawn from case to case. The concepts that have been fashioned for drawing it are too vague . . . to ensure either predictability or wisdom in the line's actual drawing. All that can be said in general is that the states may not flatly contradict established maritime law, but may "supplement" it, to the extent of allowing recoveries in [some] cases where it emphatically denies them; that states may legislate freely on shipping matters that are of predominantly local concern, but they may not so act as to interfere with the uniform working of the federal maritime legal system. . . . [T]he law has not reached a firm resting-place.[106]

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100. *Id.* at 321 n.29, 75 S. Ct. at 375 n.29.

101. *Id.* at 314 n.8, 75 S. Ct. at 370 n.8.

102. Askew v. American Waterways Operators, Inc., 411 U.S. 325, 93 S. Ct. 1590 (1973).

103. *Id.* at 344, 93 S. Ct. at 1590.

104. *E.g.*, Kossick v. United Fruit Co., 365 U.S. 731, 81 S. Ct. 886 (1961); Exxon Corp. v. Chick Kam Choo, 817 F.2d 307, 317-18 (5th Cir. 1987), *rev'd on other grounds*, 108 S. Ct. 1684 (1988); Steelmet, Inc. v. Caribe Towing Corp., 779 F.2d 1485, 1488 (11th Cir. 1986).

105. *See* Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 897, 108 S. Ct. 2218, 2224 (1988) (Scalia, J., concurring) (criticising the balancing approach under the "negative" Commerce Clause cases).

106. Grant Gilmore and Charles Black, The Law of Admiralty 44-45 (1957) (footnote omitted). The second edition had the same wording except that the writers substituted "maritime law" for the second "it" in the second sentence to clarify the meaning. Grant Gilmore and Charles Black, The Law of Admiralty 49-50 (2d ed. 1975).

So matters stood until 1994 when the Supreme Court decided *American Dredging Co. v. Miller.*[107] *American Dredging* involved a Mississippi worker who moved to Pennsylvania. He was injured while working on the Delaware River and received medical treatment in New York and Pennsylvania before returning to Mississippi. He sued in Louisiana state court for recovery under the Jones Act and for unseaworthiness, maintenance and cure, and for wages. American Dredging moved to dismiss for forum non conveniens. Reversing the lower courts, the Louisiana Supreme Court held that Louisiana's Code of Civil Procedure, which makes the doctrine of forum non conveniens unavailable in Jones Act and maritime law cases, is not preempted by federal maritime law. The United States Supreme Court affirmed the judgment of the Louisiana Supreme Court. In their four opinions, the justices revealed deep divisions about the reach and continued validity of the *Jensen* doctrine.

The majority opinion, written by Justice Scalia, gave luke-warm support to the *Jensen* doctrine, noting that it was "inappropriate to overrule *Jensen* in dictum, and without argument or even invitation."[108] The Court also said: "It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence."[109] Moreover, the Court rejected the idea that the "unifying theme of this aspect" of its admiralty jurisprudence was that states may not impair maritime commerce.[110]

The Court did not see the need to reconcile the cases because it was able to distinguish *Jensen*. It did so on two separate grounds. First, the doctrine of forum non conveniens was not a "characteristic feature of the general maritime law" because it did not originate in admiralty or have exclusive application there.[111] Second, the doctrine of forum non conveniens would not offend the uniformity of maritime law because it was procedural and because it was unpredictable since it required the trial judge to exercise discretion in balancing many factors.[112]

Justice Souter joined in the majority opinion and wrote a short concurring opinion suggesting that federal maritime law preempts state law whenever the latter "unduly interferes with the federal interest in maintaining a free flow of maritime commerce."[113]

Justice Stevens thought *Jensen* to be an unhelpful guide. He questioned whether the admiralty jurisdiction was intended to protect maritime commerce from the burdens of "discordant legislation."[114] While not willing to "abandon

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107. 510 U.S. 443, 114 S. Ct. 981 (1994).
108. *Id.* at 447 n.1, 114 S. Ct. at 985 n.1.
109. *Id.* at 450, 114 S. Ct. at 987.
110. *Id.* at 453 n.3, 114 S. Ct. at 988 n.3.
111. *Id.* at 452, 114 S. Ct. at 987.
112. *Id.* at 454, 114 S. Ct. at 989.
113. *Id.* at 456, 114 S. Ct. at 990.
114. 510 U.S. at 461, 114 S. Ct. at 992 (quoting Knickerbocker Ice v. Stewart, 253 U.S. 149, 164, 40 S. Ct. 438, 441 (1920)).

commerce as a guiding concern," he asserted that maritime commerce is adequately protected by Congress' broad authority to legislate under the Commerce Clause, and state laws that affect maritime commerce are subject to judicial scrutiny under the negative Commerce Clause doctrine and under the Due Process Clause.[115]

Two justices, Kennedy and Thomas, would have struck down the Louisiana rule based on *Jensen*. They thought that Louisiana's rule "upset[] international and interstate comity and obstruct[ed] maritime trade."[116]

American Dredging did more than add another case to the case-by-case analysis that Gilmore and Black predicted would endure. It changed the nature of the landscape. First, *Jensen*'s "characteristic feature" test may now be almost meaningless. There are few, if any, maritime doctrines that originated in admiralty and which have exclusive application there. For example, the doctrine that the plaintiff's fault did not bar recovery, once thought to be a feature of the admiralty,[117] is now common among the states. A tort recovery for unseaworthiness is a maritime concept, but it is a species of liability without fault, a concept well known to the common law. Salvage may have originated in admiralty, but it has been applied to the calculation of attorneys' fees in class action litigation.[118] General average (the idea that the sacrifice of one part of a marine venture to save the whole venture ought to be borne by all members of the venture) has parallels in the ancient regulation of caravans[119] and is similar to modern doctrines of restitution.[120]

It is not clear from *American Dredging* if a doctrine must both originate in admiralty *and* be unique to admiralty for it to be a characteristic feature or if one of these two tests will suffice. But any maritime doctrine that just happens to fulfill one or even both of these tests should hardly on that basis alone be able to preempt a state law. If the state law gave effect to an overwhelming state interest and made little difference to maritime commerce, there is no reason to prefer a maritime

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115. 510 U.S. at 461, 114 S. Ct. at 992.

116. *Id.* at 462, 114 S. Ct. at 993.

117. Pope & Talbot v. Hawn, 346 U.S. 406, 74 S. Ct. 202 (1953); The Max Morris, 137 U.S. 1, 11 S. Ct. 29 (1890); The Wanderer, 20 F. 140 (C.C.E.D. La. 1884).

118. *E.g.*, Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976); In re King Resources Company Securities Litigation, 420 F. Supp. 610 (D. Colo. 1976). *See generally* George D. Hornstein, *Legal Therapeutics: The "Salvage" Factor in Counsel Fee Awards*, 69 Harv. L. Rev. 658, 682 (1956).

119. *See* I. Epstein, The Babylonian Talmud, Bava Kamma 116b (1935): "If a caravan was traveling through the wilderness and a band of robbers threatened to plunder it, the apportionment [for buying them off] will have to be made according with the [value] of possessions [in the caravan,] but not in accordance with the number of persons there. But if they hire a guide to go in front of them, the calculation will have to be made also according to the number of souls in the caravan, though they have no right to deviate from the general custom of the ass-drivers . . . ." This not only shows a rule like that of general average but also suggests that ass-drivers had a custom on the subject. *See* Steven Friedell, *Admiralty and the Sea of Jewish Law*, 27 J. of Maritime L. & Commerce 647, 656-57 (1996).

120. *See* Archawski v. Hanioti, 350 U.S. 532, 76 S. Ct. 617 (1956).

doctrine just because it originated there and is only applied there. Something more than pride and nostalgia ought to guide the courts in depriving states of the ability to give effect to their own policies.

The second change made by *American Dredging* is to limit *Jensen* to non-procedural rules. Even though procedural rules, such as forum non conveniens, have substantive effects, the Court excluded them from *Jensen*'s reach. Moreover, the Court's reasoning would indicate that federal rules whose application is unpredictable do not preempt state law. That is, if the federal rule is unpredictable in its application, it is not a rule that would foster uniformity. Therefore the uniformity concerns of *Jensen* would not be undermined by applying a contrary state law. This theory can undermine all of *Jensen*'s uniformity doctrine. Any rule of law which defers to a fact finder's weighing of conflicting evidence is unpredictable in its application. For example, determining the amount of compensation for pain and suffering is an inexact science. A fact finder's determination of the amount of compensation is not predictable. Consequently, it can be argued that the federal interest in uniformity would not be hindered by applying a state limitation on such damages. Moreover, whether a particular set of facts constitutes negligence or unseaworthiness is a question left to the fact finder and not lightly overturned by the reviewing courts. Since predictability of the outcome is uncertain, it would not offend uniformity for states to prescribe a different standard of liability. State regulation in these areas may change the outcome in many cases, but *American Dredging* reminds us that "[t]he requirement of uniformity is not absolute."[121] Taken to these extremes, the *American Dredging* test of uniformity undermines the concept entirely. These examples may be extreme, but recall that *American Dredging* did not draw the line between permissible and impermissible state regulation. It only ruled that wherever the line will be drawn, a rule that is procedural and unpredictable in application is not protected by *Jensen*.

The majority opinion and Justice Stevens' concurrence in *American Dredging* suggested another factor that may undermine *Jensen*. These opinions suggested that Congressional action or inaction would be important in its determination of whether a state statute may be given effect. The majority opinion drew support from Congress' enactment of the Jones Act and saw a need to harmonize its rule for general maritime law claims with the rule of forum non conveniens applicable to Jones Act actions. Justice Stevens went further. Since Congress has not exercised the power to prescribe a forum non conveniens rule for state courts in admiralty cases, Congress must have "opted to permit state 'diversity' in admiralty matters," making federal preemption "inappropriate."[122] There is only one area where Congress has prescribed that federal general maritime law preempts state law. In passing the Admiralty Extension Act, Congress indicated its intention that the state law of contributory negligence would yield to the federal rule of divided

121. 510 U.S. at 451, 114 S. Ct. at 987.
122. *Id.* at 461, 114 S. Ct. at 992.

damages in collision cases between a vessel and a bridge.[123] If the Court looks to Congressional silence as an invitation for state law to be applied in admiralty cases, then *Jensen* will be moot except in ship to shore collision cases.

One year after *American Dredging* the Court decided another admiralty case, *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*[124] As discussed previously, *Grubart* held that the admiralty jurisdiction extended to torts committed by a crane sitting on a barge in the Chicago River which caused flooding of buildings in the Chicago Loop.[125] The City of Chicago, one of the defendants in the action, contended that if the torts were maritime then state law would be preempted to the detriment of the land-based parties. The Court responded that preemption was not a sure thing. Moreover the Court adopted part of Justice Stevens' reasoning in *American Dredging*. It questioned whether admiralty jurisdiction was designed to promote maritime commerce. Uniform rules of decision in admiralty cases were but a "subsidiary goal." It suggested that admiralty jurisdiction may have primarily been designed to provide a neutral forum away from local bias in cases involving foreigners.[126]

The protection of maritime commerce through uniform national laws is not what it used to be. *American Dredging* said that the *Jensen* doctrine was not concerned with preventing the impairment of maritime commerce, and *Grubart* has demoted the interest in uniform rules of decision to a secondary status. Coming on top of these two cases, *Yamaha* signals that a serious reconsideration of *Jensen* or even a fundamental rearrangement of federal and state relations in the maritime field may be underway. A later decision might confine each of these three cases. *American Dredging* dealt only with procedure; *Grubart*'s mention that state law may be applicable was only dictum; and *Yamaha* did not even mention *Jensen*, but dealt only with a "modest question"[127] of the continuation of state wrongful death remedies after *Moragne*. The tone of these cases, however, suggests something much broader. The Court is tired of *Jensen* and its progeny. It prefers to defer to Congressional judgment about questions of maritime law generally and about questions of federal preemption specifically.[128] It prefers to defer to the states when the state interest is strong. And the Court seems to be searching for a compass to help it chart its course.

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123. *See* H. R. Rep. No. 1523, 80th Cong., 2d Sess. 2 (1948).

124. 513 U.S. 527, 115 S. Ct. 1043 (1995).

125. *See supra* text at note 26.

126. 115 S. Ct. at 1054 n.6. One difficulty with this reasoning is that state courts are still available in cases involving foreigners. It is generally thought that if there is diversity jurisdiction or some other basis for federal jurisdiction except admiralty jurisdiction, the foreigner-defendant can remove to federal court based on diversity. *See* Romero v. International Terminal Operating Co., 358 U.S. 354, 371-72, 79 S. Ct. 468, 480 (1959); Armstrong v. Alabama Power Co., 667 F.2d 1385 (11th Cir. 1982). *See generally* 1 Steven Friedell, Benedict on Admiralty § 131 (1997) (forthcoming).

127. 116 S. Ct. at 626 n.8.

128. *See, e.g.*, Miles v. Apex Marine Corp., 498 U.S. 19, 27, 111 S. Ct. 317, 323 (1990) ("Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation.").

V. IS THERE A WAY OUT?

Each time the courts or Congress have extended the admiralty jurisdiction, they have created potential conflict with state sovereignty. In 1847 the Court rejected an English limitation and extended admiralty jurisdiction to waters within the body of a county.[129] Four years later, guided by Congress but not considering itself bound by it, the Supreme Court extended admiralty jurisdiction to cover the Great Lakes and the inland navigable rivers.[130] In 1948, Congress extended admiralty jurisdiction to include injuries caused by a vessel when the injuries occured on land.[131] In *Foremost*, the Court extended admiralty jurisdiction to pleasure boating. The scope of the intrusion on state sovereignty of each of these intrusions is magnified by the *Jensen* holding that state courts are bound to apply the same law that federal courts would apply to admiralty cases.

The courts or Congress might try more than one way out of the maze of admiralty jurisdiction. One way to resolve some of the conflict would be to overrule *Foremost* and hold that pleasure boating cases, including the type of case involved in *Yamaha*, are outside the admiralty jurisdiction. The Court is unlikely to take this course because it would often be impractical to determine at an early stage of litigation whether a case involves pleasure boating or commercial shipping.[132]

Another way to resolve the conflict might be to limit admiralty jurisdiction to cases involving vessels over a certain size.[133] This approach has the advantage of eliminating most pleasure boating accidents from admiralty jurisdiction, but will not avoid the choice of law problem. Larger vessels in territorial waters will still be subject to state law some of the time. Additionally, collisions between commercial vessels and pleasure boats (like the collision in *Yamaha*) will still be within admiralty jurisdiction.

Another type of solution might be to return to the pre-*Jensen* era where state courts and federal courts having diversity jurisdiction applied state law as the rule of decision whereas federal courts having admiralty jurisdiction applied maritime law. But after *Erie* it is most unlikely that courts would return to a scheme whereby the law applied to a case differed depending on which court one was in or on whether there was diversity jurisdiction.

Nor would it be feasible to turn *Jensen* upside down and require federal courts to apply state law in maritime cases. The Court cannot at this late date abandon the many areas where federal judge-made law provides the rule of decision. Cases involving collision, seamen's injuries based on unseaworthiness, maintenance and

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129. Waring v. Clarke, 46 U.S. (5 How.) 441 (1847).

130. The Genesee Chief, 53 U.S. (12 How.) 443 (1851).

131. 46 U.S.C. § 740 (1994).

132. *See* Foremost Ins. Co. v. Richardson, 457 U.S. 668, 676, 102 S. Ct. 2654, 2659 (1982).

133. Such an approach, supported by the American Law Institute, was introduced in the Senate in 1973. *See* S. Bill 1876, 93d. Cong., 1st Sess. (1973), *reprinted in* Jo Desha Lucas, Admiralty, 1991 Statute, Rule and Case Supplement 235 (1991).

cure, salvage, general average, and charter parties, are governed largely by federal judge-made law. It would be overwhelmingly disruptive to declare at this point that henceforth these areas will no longer be governed by federal admiralty law but by state laws. For similar reasons it would not be feasible to limit the federal judge-made law to cases arising on the high seas or within the ebb and flow of the tide or outside the body of a county.

The approach suggested by Justice Stevens in *American Dredging Co. v. Miller* for resolving choice of law questions in admiralty cases may have some promise. Justice Stevens would abandon the *Jensen* "special maritime pre-emption doctrine and its abstract standards of 'proper harmony' and 'characteristic features.'"[134] Justice Stevens does not advocate abandoning the reverse-*Erie* feature of *Jensen*. If state law is applicable at all, it is applicable in federal court as well as state court. Nor would Justice Stevens allow state law to apply automatically in admiralty cases. He states:

> [W]e should not lightly conclude that federal law of the sea trumps a duly enacted state statute. Instead, we should focus on whether the state provision in question conflicts with some particular substantive rule of federal statutory or common law, or, perhaps, whether federal maritime rules, while not directly inconsistent, so pervade the subject as to preclude application of state law.
> . . . Moreover state law[s] that affect maritime commerce, interstate and foreign, are subject to judicial scrutiny under the Commerce Clause.[135]

If Justice Stevens' approach were to prevail the result would not be a wholesale repudiation of the case-law that has resulted from *Jensen*. Justice Stevens would continue to recognize that some federal rules of maritime law preempt state law. He suggests going even further, creating a gray area where federal law so pervades a subject that state law cannot be validly applied. If state law were not struck down on these grounds, the state law might still run afoul of the dormant Commerce Clause.

It is worth remembering that *Jensen* also relied on the "negative" or dormant Commerce Clause. The Court said:

> A similar rule in respect to interstate commerce, deduced from the grant to Congress of power to regulate it, is now firmly established. Where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state to another, Congress can alone act upon it and provide the needed regulations. The absence of any law of Congress on the subject is equivalent to its declara-

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134. American Dredging Co. v. Miller, 510 U.S. 443, 461, 114 S. Ct. 981, 992 (1994).

135. *Id.* He also notes that the Due Process Clause protects out of-state-defendants, "especially foreigners," against assertions of state judicial power that may threaten maritime commerce. Justice Stevens is referring to the assertions of personal jurisdiction that offend the Due Process Clause.

> tion that commerce in that matter shall be free. . . . And the same character of reasoning which supports this rule, we think, makes imperative the stated limitation upon the power of the states to interpose where maritime matters are involved.[136]

Actually, *Jensen*'s holding permitted greater room for state legislation than the quoted language about the Commerce Clause would suggest. Under the Commerce Clause, the Court saw no role for states in the regulation of interstate or foreign commerce. But *Jensen* permitted a whole host of state regulations of maritime commerce.

In any event, the negative Commerce Clause jurisprudence has changed since *Jensen* was decided. The Court currently engages in a two-tier approach. If the state statute discriminates against interstate commerce it is invalid unless the state shows that it could not serve a legitimate local purpose by reasonable nondiscriminatory alternatives.[137] But if the state statute is even-handed, then the Court will weigh the state's interests against the interstate burdens to determine if the burden is reasonable.[138]

In a sense the "negative" Commerce Clause is no more legitimate than *Jensen*. Justice Stevens justifiably criticized *Jensen* because there is only a tenuous connection between the grant of admiralty jurisdiction in Article III in the Constitution and the strong federal preemption doctrine created by *Jensen*.[139] There is also only a tenuous connection between the grant of power to Congress to regulate commerce and the current view of the authority of the states in this area.[140] An advantage to using the "negative" Commerce Clause as a basis for resolving conflicts in admiralty is that it may harmonize these cases with the broader set of federal-state conflicts.

However, there is a fundamental difference between the usual "negative" Commerce Clause case and admiralty cases. In the former situation the federal courts have no power to make common law. Congress' failure to legislate may be seen as a tacit invitation for states to experiment. But in the admiralty area the federal courts are empowered to make law.[141] For that reason Justice Stevens insists that a court can only enforce a state statute in the maritime context if it passes another test. It must not contravene a rule of judge-made law or, perhaps, apply to an area dominated by judge-made law.[142]

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136. Southern Pacific Co. v. Jensen, 244 U.S. 205, 217, 37 S. Ct. 524, 529 (1916) (citations omitted).

137. New Energy Co. v. Limbach, 486 U.S. 269, 108 S. Ct. 1803 (1988).

138. *See* Bendix Autolite Corp. v. Midwesco Enterprises, 486 U.S 888, 108 S. Ct. 2218 (1988); Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 108 S. Ct. 2080 (1986); Pike v. Bruce Church, Inc., 397 U.S. 137, 90 S. Ct. 844 (1970).

139. *American Dredging*, 510 U.S. at 460, 114 S. Ct. at 991.

140. *See* Liza Heinzerling, *The Commercial Constitution*, 1995 Sup. Ct. Rev. 217, 218-19.

141. *See* Yamaha Motor Corp., U.S.A. v. Calhoun, 116 S. Ct. 619, 624 (1996) (the general maritime law is "a species of judge-made federal common law").

142. 510 U.S. at 461, 114 S. Ct. at 992 ("[W]e should focus on whether the state provision in

In a sense, Justice Stevens proposes not so much an overruling of *Jensen* as an updating of that decision. The major difference between *Jensen* and Justice Stevens' approach is that under *Jensen* if there was no general maritime law on point, the courts had a duty to make it. Under Justice Stevens' approach, the courts would apply state law on these matters unless the issue is in an area where federal law was already pervasive.

Nor would Justice Stevens' approach put an end to the uncertainty of whether state law may supplement maritime law when there is a strong state concern. Justice Stevens would not permit state law to apply if it "conflicts" with federal law, but this still leaves a lot of room for state law to provide additional remedies or otherwise to supplement federal law.

Let us consider a few cases to see how they might be decided under Justice Stevens' approach. In *De Loach v. Companhia de Navegacao Lloyd Brasileiro*,[143] the Third Circuit considered whether a minor plaintiff could recover damages for loss of society of his injured father, who was a longshore worker injured aboard a vessel in Philadelphia. The court looked to the prevailing common law of the states. It found that a majority of states denied recovery when a child sustained loss of society due to non-fatal injuries suffered by a parent. It then determined that admiralty case law should not fashion such a recovery. In part, the court considered Congress' desire to limit the liability of stevedores and shipowners. The case treated state law correctly under *Jensen*. The court found no rule in either federal statutes or admiralty case law. It turned to the common law for guidance and fashioned a rule that would be uniformly applied, even in those few states that would have allowed recovery had the matter been decided under their common law.

De Loach might be decided differently under Justice Stevens' analysis. If Pennsylvania law had allowed recovery for this type of injury a court might enforce that right even in a maritime context. The state law would not conflict with a federal rule, assuming that the lack of a right to recover these damages is seen as a "gap" in the federal law and not as a rule denying recovery. However, a court might conclude that the Longshore Harbor Workers Compensation Act "so pervades the subject as to preclude application of state law."[144] Similarly, a court might conclude that the state's interest in providing damages for children of injured parents (who already have recovered damages on their

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question conflicts with some particular substantive rule of federal statutory or *common law*.") (emphasis added).

143. 782 F.2d 438 (3d Cir. 1986). A similar issue arose in a First Circuit case, The Lyon v. Ranger III, 858 F.2d 22 (1st Cir. 1988). Then-Judge Breyer wrote that in the absence of a special statutory liability scheme the court is "to use common law tort principles consistent with principles of admiralty. . . . And, because the accident took place in Massachusetts waters only 1/4 mile from the coast, we should turn to Massachusetts law." *Id.* at 27. The issue was whether to impute the negligence of a diver to his fellow divers.

144. American Dredging Co. v. Miller, 510 U.S. 443, 461, 114 S. Ct. 981, 992 (1994) (Stevens, J., concurring).

own behalf) is not sufficient to offset the burden on interstate and foreign commerce.

A more complicated set of problems was presented by *Muratore v. M/S Scotia Prince*,[145] in which a photographer was alleged to have inflicted severe emotional distress on a passenger aboard a ferry from Maine to Nova Scotia. The District Court concluded that state law governed the claim under the maritime but local doctrine. It found no federal rule on the subject, but found a compelling state interest and no "unique maritime interest."[146] The Court of Appeals accepted the application of Maine law "for the purposes of [the] appeal" because parties did not object to the application of state law.[147] Even though state law governed this underlying issue, the two courts applied federal law to determine whether the vessel owner was liable for the torts of the photographer who was an independent contractor. They also applied federal law to the issue of punitive damages, although the courts differed on whether punitive damages were appropriate.

The result seems justifiable under *Jensen* because the state interest in regulating the infliction of emotional distress on passengers is strong and the federal interests in having a uniform rule for commercial shipping is weak. The federal interest is much stronger on the issue of the shipowner's liability for the torts of an independent contractor and on the issue of punitive damages. If the case were analyzed under Justice Stevens' approach the case would probably come out the same. Certainly the state law of emotional distress would apply as this is a matter of strong state interest that does not conflict with a federal law. The state interest in determining the shipowner's liability would seem to be offset by the federal judge-made law in this area. It is unclear how Justice Stevens would resolve the issue of punitive damages. If there is a clear federal rule on the subject it would prevail. But in the absence of such a rule, a strong state interest in deterring wrongful conduct would probably be given effect.

After *Yamaha*, courts will be pressed to apply state law more readily in personal injury cases on board local sightseeing vessels. State law sometimes gives passengers on common carriers a greater level of protection than does maritime law. Under state law the burden of proof might be more favorable to the injured passenger or the standard of care might be higher than under maritime law. In the past, courts have held that the federal rule preempts the state laws.[148] It seems odd that states can regulate the rights of passengers on a sightseeing bus but not the rights of those on a sightseeing boat. The issues presented by these cases are of little federal interest with respect to a need for federal uniformity. The cases mainly present issues of local concern. Even under *Jensen* one could argue that the

145. 845 F.2d 347 (1st Cir. 1988), *rev'g in part and vacating in part* 656 F. Supp. 471 (D. Me. 1987).

146. 656 F. Supp. at 480 n.16.

147. 845 F.2d at 352 n.3.

148. *E.g.*, Branch v. Schuman, 445 F.2d 175 (5th Cir. 1971); Rindfleisch v. Carnival Cruise Lines, 498 So. 2d 488 (Fla. Dist. Ct. App. 1986); Reneau v. Shoreline Marine Sightseeing Co., 1986 AMC 1274 (N.D. Ill. 1986).

state interests in protecting passengers on local sightseeing vessels outweighs a remote federal interest in uniform regulation of all such vessels.

It is not clear if Justice Stevens would come to a different conclusion. Do the rules requiring carriers to exercise only reasonable care and imposing the burden of proof on the plaintiff count as "particular substantive rules of federal statutory or common law"? Federal law prohibits a carrier from inserting in any contract any provision purporting to relieve the carrier from liability for negligence.[149] But the statute establishes only a floor not a ceiling to the carrier's liability standard. In *Kermarec v. Compagnie Generale Transatlantique*,[150] the Supreme Court held that federal law preempted state tort law as applied to a licensee aboard a vessel. The Court held that the "standards of maritime law" applied to injuries occurring on board a vessel in navigable waters and that under maritime law a shipowner "owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew."[151] Other courts have held that *Kermarec* applies to passengers.[152] But it is still possible that under Justice Stevens' approach a court would give weight to state law. There is some authority that under maritime law carriers owe passengers the "highest degree" of care.[153] One can therefore argue that state laws giving passengers similar protection do not conflict with some "particular" federal rule.

The Stevens approach has some of the same characteristics as the *Jensen* doctrine. It is impossible to know if a lack of recovery under federal law is a "gap" or a rule denying recovery, and it still requires courts to engage in the difficult job of balancing incommensurate state and federal interests.[154] These characteristics may be seen either as deficiencies or as useful devices for giving the courts flexibility and discretion. But if adopted, the Stevens approach would require greater deference to states and would slow the development of federal judge-made law. Courts would be more reluctant to create a new federal rule and would instead apply state law more often.

VI. CONCLUSION

No solution to the admiralty jurisdiction, whether offered by Congress or by the courts, will be simple or perfect. Three features of the current situation will

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149. 46 U.S.C. § 183c (1994).

150. 358 U.S. 625, 79 S. Ct. 406 (1959).

151. *Id.* at 630, 79 S. Ct. at 410.

152. *E.g.*, Rainey v. Paquet Cruises, Inc., 709 F.2d 169 (2d Cir. 1983); Gibboney v. Wright, 517 F.2d 1054 (5th Cir. 1975).

153. Liverpool & Great Western Steam Co. v. Phenix Ins. Co., 129 U.S. 397, 9 S. Ct. 469 (1889); Moore-McCormack Lines v. Russak, 266 F.2d 573 (9th Cir. 1959).

154. As Justice Scalia observed:

> This process is ordinarily called "balancing," but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy.

Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 897, 108 S. Ct. 2224, 2225 (1988) (Scalia, J., concurring).

continue. First, federal statutes will continue to govern in major areas of admiralty litigation. The Jones Act[155] and the Longshore Workers Harbors Compensation Act[156] are the principal sources for determining the rights of injured seamen and longshore workers, respectively. COGSA[157] defines the rights of shippers of goods under bills of lading. A federal statute defines the rights of ship owners to limit their liability. Congress' ability to legislate in these areas and in any area affecting maritime commerce is unquestioned.

A second feature of admiralty law will be that federal courts will continue to make judge-made law. Federal judge-made law so extensively governs certain areas of the law, such as collisions, unseaworthiness, and maintenance and cure, that it would be wasteful to rule that federal judge-made law is inappropriate.

Third, state law will continue to regulate many matters that are not only important to the states, but which would be hard for federal courts to regulated on their own. This is particularly so when state legislatures have promulgated detailed regulatory schemes. The federal courts are not well suited to fill in the void that would be created if this legislation could not appropriately be applied in admiralty. And it is unlikely that Congress will replace all of the state regulation with federal legislation.

We are witnessing a Supreme Court that is sensitive to the interests of states to govern themselves. This Court is reluctant to read federal statutes as preempting state law—particularly in areas "traditionally occupied" by the states.[158] Some of the justices are concerned that the federal courts' intrusion in these areas will make political responsibility illusory.[159] Justice Ginsburg, the author of the *Yamaha* decision, dissented in another case this term which struck down an Alabama court's award of punitive damages as being excessive.[160] She thought the Court "unnecessarily and unwisely venture[d] into territory traditionally within the State's domain. . . ."[161] We can expect the Court to give greater leeway to state law in admiralty matters, especially when the federal interests are attenuated.

It would be helpful to recall that jurisdiction and choice of law are related matters. When a federal or state judge determines that a case is within admiralty jurisdiction, the judge is effectively saying that federal judge-made law might govern the case. It follows that cases should be kept out of admiralty jurisdiction only if it is clear that state law will govern this type of case. When it is clear from the outset that state law will provide the rule of decision, there is no federal interest in hearing the case in admiralty. Federal courts need not hear cases involving non-diverse parties when it is clear that state law will provide the rule of decision.

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155. 46 U.S.C. § 688 (1994).

156. 33 U.S.C. § 902 et seq. (1994).

157. 46 U.S.C. § 1300 et seq. (1994).

158. Medtronic, Inc. v. Lohr, 116 S. Ct. 2240, 2250 (1996) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947)).

159. United States v. Lopez, 115 S. Ct. 1624, 1638 (1995) (Kennedy, J., concurring).

160. BMW of North America, Inc. v. Gore, 116 S. Ct. 1589 (1996).

161. *Id.* at 1614.

Jurisdictional and choice of law questions need to be resolved differently. There is a greater need for bright line rules to govern jurisdictional questions than choice of law issues. Jurisdictional questions must be capable of resolution at an early stage of litigation when many important facts are in dispute. It would be wasteful for the federal courts and the parties to hold a mini-hearing to resolve the jurisdictional question. By contrast, choice of law questions can usually wait.

As a consequence, the test for admiralty jurisdiction needs to be more inclusive and simpler than the test for choice of law. The old locality rule which included every tort occurring on the navigable water was such a rule. The *Sisson* test,[162] which includes nearly every tort involving any type of vessel on the navigable water also satisfies these needs. By contrast, the *Kelly* test,[163] or any multi-factor test, is not a good vehicle for determining jurisdiction. Such a test presents too many variables and too much uncertainty for the parties and for the courts. The *Sisson* test is an improvement over the locality rule in that it allows courts to easily exclude a few types of cases, such as those involving only swimmers or surfboards, where state law ought to apply. Unfortunately *Sisson* creates unnecessary doubt about whether all torts involving vessels on navigable waters will be maritime torts. One hopes that *Yamaha*'s determination about admiralty jurisdiction involving the collision of a jet ski and a commercial vessel—it required the Court to spend only one sentence—will be the norm.

As for the choice of law problem, the courts are likely either to continue to struggle under the *Jensen* doctrine, badly battered as it is, or under an approach like that suggested by Justice Stevens in *American Dredging*. Either way the courts are going to encounter uncertainty as they attempt to balance the needs of the states and the needs of the federal government. Uncertainty may be the price we need to pay. The kinds of federal-state conflicts that arise in the maritime context are so many and so varied that it is unlikely that any one simple formula will satisfactorily answer them all. For the moment, all that can be said is that the Court is likely to give states more leeway in regulating maritime matters.

The line dividing land from sea has never been sharp or clear. There has always been a blurring at the margins. The boundary has been a source of confusion. It has also been an opportunity for creativity.[164]

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162. *See supra* text accompanying note 25.

163. *See supra* text accompanying note 22.

164. *Compare* Jerome G. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 115 S. Ct. 1043, 1056 (1995) (Justice Thomas, concurring) (admiralty "once provided a jurisdictional rule almost as clear as the 9th and 10th verses of Genesis" concerning the creation of the land and sea) *with* I. Epstein, The Babylonian Talmud, Bava Metzia 21b (1935) ("[If the lost article is found] in the intertidal space of the seashore or on ground that is flooded by a river, then, even if it has an identification mark, the Divine Law permits [the finder to acquire it]"). The ancient Akkadian creation myth, Enuma Elish attributes the initial creation of the world to the commingling of the fresh waters with the salt waters. *See* James B. Pritchard, Ancient Near Eastern Texts 61 n.3 (3d ed. 1969).